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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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09/289,258 04/09/99 VASEL

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EXAMINER

022242 PM82/0223  
FITCH EVEN TABIN AND FLANNERY  
120 SOUTH LA SALLE STREET  
SUITE 1600  
CHICAGO IL 60603-3406

TUDOR, H  
ART UNIT PAPER NUMBER

3641  
DATE MAILED:

02/23/01

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

# Office Action Summary

Application No.

09/289,258

Applicant(s)

Vasek et al

Examiner

Tudor, H-J

Group Art Unit

3641

—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE Three MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

## Status

- ☒ Responsive to communication(s) filed on 9/19/00 & 12-8-00
- ☐ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

## Disposition of Claims

- ☒ Claim(s) 101-108, 112, 114-119, 122-132, 186-190 is/are pending in the application.  
Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- ☒ Claim(s) 101-108, 112, 114-119, 122-132, 186-190 is/are rejected.
- ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- ☐ Claim(s) \_\_\_\_\_ are subject to restriction or election requirement.

## Application Papers

- ☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.
- ☐ The proposed drawing correction, filed on \_\_\_\_\_ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.
- ☐ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
  - ☐ All ☐ Some\* ☐ None of the CERTIFIED copies of the priority documents have been received.
  - ☐ received in Application No. (Series Code/Serial Number) \_\_\_\_\_.
  - ☐ received in this national stage application from the International Bureau (PCT Rule 1.7.2(a)).

\*Certified copies not received: \_\_\_\_\_

## Attachment(s)

- ☒ Information Disclosure Statement(s), PTO-1449, Paper No(s) 4, 10, 12 ☐ Interview Summary, PTO-413
- ☒ Notice of Reference(s) Cited, PTO-892 ☐ Notice of Informal Patent Application, PTO-152
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948 ☐ Other \_\_\_\_\_

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1. Applicants have elected the invention of Group I, the species of Figs. 14-16 of the first Election of Species Requirement, the species of Fig. 19 of the second Election of Species Requirement and species A. Compressed gas launcher of the third Election of Species Requirement. Claims 101-108, 112, 114-119, 122-132 and 186-190 readable on the elected invention. The non-elected claims have been canceled by the applicants.

2. Applicants' elections in Papers No. 8 and 11 are acknowledged. Because applicants did not distinctly and specifically point out the supposed errors in the restriction requirement, the election has been treated as an election without traverse (MPEP § 818.03(a)).

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

4. Claims 186-190 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant

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regards as the invention. There is no positive antecedent basis for "the capsule", in line 4 of claim 186.

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371© of this title before the invention thereof by the applicant for patent.

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

7. Claims 101, 105-107 and 186 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Carbone.

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Carbone discloses a frangible spherical projectile containing pepper for riot control, line 10 of col. 1.

8. Claims 115-117, 122, 126-129, 131 and 132 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carbone. It would have been an obvious design choice to one having ordinary skill in the art at the time the invention was made to vary the amount of pepper in the projectile to achieve a desired result. Carbone also discloses having a marking substance in the projectile, line 9 of col. 1. It would have been an obvious design choice to one having ordinary skill in the art at the time the invention was made to employ both a marking substance and the pepper in the projectile to achieve a dual effect upon target impact.

9. Claims 102, 130 and 187 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carbone in view of Mangolds et al. Carbone is applied as above. However, Carbone does not disclose a projectile comprising oleoresin capsicum. Mangolds et al teach oleoresin capsicum to be an art recognized irritant, lines 21-24 of col. 11. To employ powdered oleoresin capsicum in the Carbone projectile, as taught by Mangolds et al as being an art recognized equivalent irritant, would have been obvious to one

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having ordinary skill in the art at the time the invention was made.

10. Claims 102-104 and 123 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carbone in view of Fedida. Carbone is applied as above. However, Carbone does not disclose a powdered material comprising oleoresin capsicum and an inert powder. Fedida teaches a powder comprising a capsicum and an inert powder to be an art recognized equivalent irritant for a frangible projectile. Fedida teaches that it is known to vary the amount of irritant in the powder, lines 8-18 of col. 5. To employ a powder comprising a capsicum and an inert powder in the Carbone projectile, as taught by Fedida as being an art recognized equivalent irritant, would have been obvious to one having ordinary skill in the art at the time the invention was made. It would have been an obvious design choice to one having ordinary skill in the art at the time the invention was made to employ powdered oleoresin capsicum in the projectile formed by the combination of Carbone and Fedida.

11. Claims 108, 112, 114-117 and 126-129 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carbone in view of Olson. Carbone is applied as above. However, Carbone does not

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disclose a frangible projectile comprising two halves having internal score lines. Olson teaches an art recognized equivalent capsule for a frangible projectile comprising two halves having internal score lines which enhance fragmentation upon impact. To employ a capsule formed of two halves having internal score lines in the Carbone projectile to enhance fragmentation, as taught by Olson, would have been obvious to one having ordinary skill in the art at the time the invention was made. It would have been an obvious design choice to one having ordinary skill in the art at the time the invention was made to vary the amount of pepper in the projectile to achieve a desired result.

12. Claims 118 and 119 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carbone in view of Adelman. Carbone is applied as above. However, Carbone does not disclose metal powders in the projectile. Adelman teaches using metal powders in a frangible projectile which will enhance the ballistics of the projectile and enhance fragmentation of the projectile upon impact. To employ metal powders in the Carbone projectile, as taught by Adelman, would have been obvious to one having ordinary skill in the art at the time the invention was made.

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13. Claims 115-117 and 124-129 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carbone in view of Smith. Carbone is applied as above. However, Carbone does not disclose a capsule comprising two hemispheres having sealing membranes. Smith teaches forming a frangible projectile capsule of two hemispheres having sealing membranes to simplify the filling and sealing process. To employ a frangible capsule comprising two hemispheres having sealing membranes in the Carbone projectile to simplify the filling and sealing process, as taught by Smith, would have been obvious to one having ordinary skill in the art at the time the invention was made. It would have been an obvious design choice to one having ordinary skill in the art at the time the invention was made to vary the amount of pepper to achieve a desired result.

14. Claim 188 is rejected under 35 U.S.C. 103(a) as being unpatentable over Carbone in view of Slonaker et al. Carbone is applied as above. Slonaker et al teach that it is old and well known in the art to fire spherical frangible projectiles from a compressed gas paint ball launcher. To employ the launcher of Slonaker et al to launch the spherical projectile of Carbone, would have been obvious to one having ordinary skill in the art at the time the invention was made.



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15. Claims 189 and 190 are rejected under 35 U.S.C. 103(a) as being unpatentable over Carbone in view of Slonaker et al and Reynolds, Jr. Carbone and Slonaker et al are applied as above. However, Carbone and Slonaker et al do not disclose a flashlight on the launcher. Reynolds, Jr. teaches that it is old and well known in the art to employ a flashlight on a launcher to illuminate a target. To employ a flashlight on the device formed by the combination of Carbone and Slonaker et al, as taught by Reynolds, Jr., would have been obvious to one having ordinary skill in the art at the time the invention was made.

16. Claims 101, 102, 105-107 and 186-190 are rejected under 35 U.S.C. 102(e) as being clearly anticipated by Vasel et al.

17. Claims 103, 104, 115-117 and 126-132 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vasel et al. It would have been an obvious design choice to one having ordinary skill in the art at the time the invention was made to vary the mount of oleoresin capsicum in the projectile.

18. Claims 103, 104 and 123 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vasel et al in view of Fedida. Vasel et al are applied as above. However, Vasel et al do not disclose

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a powdered material comprising oleoresin capsicum and an inert powder. Fedida teaches a powder comprising a capsicum and an inert powder to be an art recognized equivalent irritant for a frangible projectile. Fedida teaches that it is known to vary the amount of irritant in the powder, lines 8-18 of col. 5. To employ a powder comprising oleoresin capsicum and an inert powder in the Vasel et al projectile, as taught by Fedida as being an art recognized equivalent irritant, would have been obvious to one having ordinary skill in the art at the time the invention was made.

19. Claims 108, 112, 114, 115-117 and 126-132 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vasel et al in view of Olson. Vasel et al are applied as above. However, Vasel et al do not disclose a frangible projectile comprising two halves having internal score lines. Olson teaches an art recognized equivalent capsule for a frangible projectile comprising two halves having internal score lines which enhance fragmentation upon impact. To employ a capsule formed of two halves having internal score lines in the Vasel et al projectile to enhance fragmentation, as taught by Olson, would have been obvious to one having ordinary skill in the art at the time the invention was made. It would have been an obvious design choice to one having

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ordinary skill in the art at the time the invention was made to vary the amount of oleoresin capsicum in the projectile to achieve a desired result.

20. Claims 118 and 119 are rejected under 35 U.S.C. 103(a) as being unpatentable over Vassel et al in view of Adelman. Vassel et al are applied as above. However, Vassel et al do not disclose metal powders in the projectile. Adelman teaches using metal powders in a frangible projectile which will enhance the ballistics of the projectile and enhance fragmentation of the projectile upon impact. To employ metal powders in the Vassel et al projectile, as taught by Adelman, would have been obvious to one having ordinary skill in the art at the time the invention was made.

21. Claim 122 is rejected under 35 U.S.C. 103(a) as being unpatentable over Vassel et al in view of Carbone. Vassel et al is applied as above. However, Vassel et al do not disclose a marking substance in the projectile. Carbone teaches that it is old and well known in the art to employ a marking substance in a frangible spherical projectile to mark a target. To employ a marking substance in the Vassel et al projectile as taught by

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Carbone et al, would have been obvious to one having ordinary skill in the art at the time the invention was made.

22. Claims 115-117 and 124-132 are rejected under 35

U.S.C. 103(a) as being unpatentable over Vassel et al in view of Smith. Vassel et al is applied as above. However, Vassel et al do not disclose a capsule comprising two hemispheres having sealing membranes. Smith teaches forming a frangible projectile capsule of two hemispheres having sealing membranes to simplify the filling and sealing process. To employ a frangible capsule comprising two hemispheres having sealing membranes in the Vassel et al projectile to simplify the filling and sealing process, as taught by Smith, would have been obvious to one having ordinary skill in the art at the time the invention was made. It would have been an obvious design choice to one having ordinary skill in the art at the time the invention was made to vary the amount of oleoresin capsicum to achieve a desired result.

23. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982);

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*In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321© may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

24. Claims 101-107, 115-117 and 126-132 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 and 3 of U.S. Patent No. 5,965,839 to Vasel et al. Although the conflicting claims are not identical, they are not patentably distinct from each other because claims 1 and 3 of the patent clearly disclose a frangible projectile containing powdered oleoresin capsicum. It would have been obvious to one having ordinary skill in the art at the time the invention was made to vary the amount of oleoresin capsicum in the projectile.

25. Claims 103, 104 and 123 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 and 3 of U.S. Patent No. 5,965,839 to Vasel et al (hereafter referred to as Vasel et al) in view of Fedida. Vasel et al are applied as above. However, Vasel et al

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do not disclose a powdered material comprising oleoresin capsicum and an inert powder. Fedida teaches a powder comprising a capsicum and an inert powder to be an art recognized equivalent irritant for a frangible projectile. Fedida teaches that it is known to vary the amount of irritant in the powder, lines 8-18 of col. 5. To employ a powder comprising oleoresin capsicum and an inert powder in the Vasel et al projectile, as taught by Fedida as being an art recognized equivalent irritant, would have been obvious to one having ordinary skill in the art at the time the invention was made.

26. Claims 108, 112, 114-117 and 126-132 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 and 3 of U.S. Patent No. 5,965,839 to Vasel et al (hereafter referred to as Vasel et al) in view of Olson. Vasel et al are applied as above. However, Vasel et al do not disclose a frangible projectile comprising two halves having internal score lines. Olson teaches an art recognized equivalent capsule for a frangible projectile comprising two halves having internal score lines which enhance fragmentation upon impact. To employ a capsule formed of two halves having internal score lines in the Vasel et al projectile to enhance fragmentation, as taught by Olson, would have been

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obvious to one having ordinary skill in the art at the time the invention was made. It would have been an obvious design choice to one having ordinary skill in the art at the time the invention was made to vary the amount of oleoresin capsicum in the projectile to achieve a desired result.

27. Claims 118 and 119 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 and 3 of U.S. Patent No. 5,965,839 to Vasel et al (hereafter referred to as Vasel et al) in view of Adelman. Vasel et al are applied as above. However, Vasel et al do not disclose metal powders in the projectile. Adelman teaches using metal powders in a frangible projectile which will enhance the ballistics of the projectile and enhance fragmentation of the projectile upon impact. To employ metal powders in the Vasel et al projectile, as taught by Adelman, would have been obvious to one having ordinary skill in the art at the time the invention was made.

28. Claim 122 is rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 and 3 of U.S. Patent No. 5,965,839 to Vasel et al (hereafter referred to as Vasel et al) in view of Carbone. Vasel

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et al is applied as above. However, Vasel et al do not disclose a marking substance in the projectile. Carbone teaches that it is old and well known in the art to employ a marking substance in a frangible spherical projectile to mark a target. To employ a marking substance in the Vasel et al projectile as taught by Carbone et al, would have been obvious to one having ordinary skill in the art at the time the invention was made.

29. Claims 124, 125 and 126-132 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 and 3 of U.S. Patent No. 5,965,839 to Vasel et al (hereafter referred to as Vasel et al) in view of Smith. Vasel et al is applied as above. However, Vasel et al do not disclose a capsule comprising two hemispheres having sealing membranes. Smith teaches forming a frangible projectile capsule of two hemispheres having sealing membranes to simplify the filling and sealing process. To employ a frangible capsule comprising two hemispheres having sealing membranes in the Vasel et al projectile to simplify the filling and sealing process, as taught by Smith, would have been obvious to one having ordinary skill in the art at the time the invention was made. It would have been an obvious design choice to one having ordinary skill in the art at the time the invention was made to



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vary the amount of oleoresin capsicum to achieve a desired result.

30. Claims 186-188 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 and 3 of U.S. Patent No. 5,965,839 in view of Slonaker et al. Vassel et al are applied as above. However, Vassel et al do not disclose a compressed gas paint ball launcher. Slonaker et al teach that it is old and well known in the art to employ a compressed gas paint ball launcher to launch spherical projectiles. To employ the launcher of Slonaker et al to launch the Vassel et al projectile would have been obvious to one having ordinary skill in the art at the time the invention was made.

31. Claims 189 and 190 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1 and 3 of U.S. Patent No. 5,965,839 to Vassel et al in view of Slonaker et al and Reynolds, Jr. References are applied as above. To employ the flashlight on the Slonaker et al launcher to illuminate a target, as taught by Reynolds, Jr., would have been obvious to one having ordinary skill in the art at the time the invention was made.

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32. Claims 101-108, 112, 114-119, 122-132 and 186-190 are directed to an invention not patentably distinct from claims 1 and 3 of commonly assigned U. S. Patent 5,965,839. Specifically, Fedida teaches a powder comprising a capsicum and an inert powder to be an art recognized equivalent irritant for a frangible projectile. Fedida teaches that it is known to vary the amount of irritant in the powder, lines 8-18 of col. 5. Olson teaches an art recognized equivalent capsule for a frangible projectile comprising two halves having internal score lines which enhance fragmentation upon impact. Adelman teaches using metal powders in a frangible projectile which will enhance the ballistics of the projectile and enhance fragmentation of the projectile upon impact. Carbone teaches that it is old and well known in the art to employ a marking substance in a frangible spherical projectile to mark a target. Smith teaches forming a frangible projectile capsule of two hemispheres having sealing membranes to simplify the filling and sealing process. Slonaker et al teach that it is old and well known in the art to employ a compressed gas paint ball launcher to launch spherical projectiles. Reynolds, Jr. teaches using a flashlight on a launcher to illuminate a target.

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33. Commonly assigned U. S. Patent 5,965,839, discussed above, would form the basis for a rejection of the noted claims under 35 U.S.C. 103(a) if the commonly assigned case qualifies as prior art under 35 U.S.C. 102(f) or (g) and the conflicting inventions were not commonly owned at the time the invention in this application was made. In order for the examiner to resolve this issue, the assignee is required under 37 CFR 1.78© and 35 U.S.C. 132 to either show that the conflicting inventions were commonly owned at the time the invention in this application was made or to name the prior inventor of the conflicting subject matter. Failure to comply with this requirement will result in a holding of abandonment of the application.

A showing that the inventions were commonly owned at the time the invention in this application was made will preclude a rejection under 35 U.S.C. 103(a) based upon the commonly assigned case as a reference under 35 U.S.C. 102(f) or (g).

34. Claims 101, 105-107, 115-117, 122, 126-129, 131 and 132 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 12 of copending Application No. 09/543,289 to Vasel et al (hereafter referred to as Vasel et al I) in view of Carbone. Vasel et al I discloses the invention substantially as claimed.

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However, Vasel et al I does not disclose a spherical projectile which disperses the powder radially upon target impact. Carbone teaches that it is old and well known in the art to employ a spherical frangible projectile to disperse pepper radially upon target impact. Carbone also teaches that it is old and well known in the art to employ a target marking substance in a projectile to mark a target. To employ a frangible spherical projectile and a marking substance in the Vasel et al I projectile to disperse the pepper substance radially and mark a target, as taught by Carbone, would have been obvious to one having ordinary skill in the art at the time the invention was made. It would have been an obvious design choice to one having ordinary skill in the art at the time the invention was made to vary the amount of pepper in the projectile formed by the combination of Vasel et al I and Carbone to achieve a desired result.

This is a provisional obviousness-type double patenting rejection.

35. Claims 102 and 130 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 12 of copending Application No. 09543,289 to Vasel et al (hereafter referred to as Vasel et al I)

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in view of Carbone and Mangolds et al. References are applied as above. To employ powdered oleoresin capsicum in the projectile formed by the combination of Vasel et al I and Carbone, as taught by Mangolds et al as being an art recognized equivalent irritant, would have been obvious to one having ordinary skill in the art at the time the invention was made.

This is a provisional obviousness-type double patenting rejection.

36. Claims 102-104 and 123 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 12 of copending Application No. 09/543,289 to Vasel et al (hereafter referred to as Vasel et al I) in view of Carbone and Fedida. References are applied as above. To employ a powder comprising a capsicum and an inert powder in the projectile formed by the combination of Vasel et al I and Carbone, as taught by Fedida as being an art recognized equivalent irritant, would have been obvious to one having ordinary skill in the art at the time the invention was made. It would have been an obvious design choice to one having ordinary skill in the art at the time the invention was made to employ powdered oleoresin capsicum in the projectile formed by the combination of Carbone and Fedida.

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This is a provisional obviousness-type double patenting rejection.

37. Claims 108, 112, 114-117 and 126-129 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 12 of copending Application No. 09/543,289 to Vasel et al (hereafter referred to as Vasel et al I) in view of Carbone and Olson. References are applied as above. To employ a capsule formed of two halves having internal score lines in the projectile formed by the combination of Vasel et al I and Carbone to enhance fragmentation, as taught by Olson, would have been obvious to one having ordinary skill in the art at the time the invention was made. It would have been an obvious design choice to one having ordinary skill in the art at the time the invention was made to vary the amount of pepper in the projectile to achieve a desired result.

This is a provisional obviousness-type double patenting rejection.

38. Claims 118 and 119 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 12 of copending Application No.

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09/543,289 to Vasel et al (hereafter referred to as Vasel et al I) in view of Carbone and Adelman. References are applied as above. To employ metal powders in the projectile formed by the combination of Vasel et al I and Carbone, as taught by Adelman, would have been obvious to one having ordinary skill in the art at the time the invention was made.

This is a provisional obviousness-type double patenting rejection.

39. Claims 115-117 and 124-129 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 12 of copending Application No. 09/543,289 to Vasel et al (hereafter referred to as Vasel et al I) in view of Carbone and Smith. References are applied as above. To employ a frangible capsule comprising two hemispheres having sealing membranes in the projectile formed by the combination of Vasel et al I and Carbone to simplify the filling and sealing process, as taught by Smith, would have been obvious to one having ordinary skill in the art at the time the invention was made. It would have been an obvious design choice to one having ordinary skill in the art at the time the invention was made to vary the amount of pepper to achieve a desired result.

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This is a provisional obviousness-type double patenting rejection.

40. Claims 186 and 188 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 12 of copending Application No. 09/543,289 to Vassel et al (hereafter referred to as Vassel et al I) in view of Carbone and Slonaker et al. References are applied as above. To employ a compressed gas paint ball launcher to launch the projectile formed by the combination of Vassel et al I and Carbone, as taught by Slonaker et al, would have been obvious to one having ordinary skill in the art at the time the invention was made.

This is a provisional obviousness-type double patenting rejection.

41. Claim 187 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 12 of copending Application No. 09/543,289 to Vassel et al (hereafter referred to as Vassel et al I) in view of Carbone, Slonaker et al and Mangolds et al. References are applied as above. It would have been obvious to one having ordinary skill in the art at the time the invention



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was made to employ a compressed gas paint ball launcher to launch the projectile formed by the combination of Vasel et al I, Carbone and Mangolds et al, as taught by Slonaker et al.

This is a provisional obviousness-type double patenting rejection.

42. Claims 189 and 190 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 12 of copending Application No. 09/543,289 to Vasel et al (hereafter referred to as Vasel et al I) in view of Carbone, Slonaker et al and Reynolds, Jr..

References are applied as above. To employ a flashlight on the Slonaker et al launcher to illuminate a target, as taught by Reynolds, Jr., would have been obvious to one having ordinary skill in the art at the time the invention was made.

This is a provisional obviousness-type double patenting rejection.

43. Claims 101-108, 112, 114-119, 122-132 and 186-190 are directed to an invention not patentably distinct from claim 12 of commonly assigned application 09/543,289. Specifically, Carbone teaches a spherical frangible projectile and a marking substance, Mangolds et al teach oleoresin capsicum to be a well known

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irritant, Fedida teaches a powder comprising a capsicum and an inert powder to be an art recognized equivalent irritant for a frangible projectile. Fedida teaches that it is known to vary the amount of irritant in the powder, lines 8-18 of col. 5.

Olson teaches an art recognized equivalent capsule for a frangible projectile comprising two halves having internal score lines which enhance fragmentation upon impact. Adelman teaches using metal powders in a frangible projectile which will enhance the ballistics of the projectile and enhance fragmentation of the projectile upon impact. Smith teaches forming a frangible projectile capsule of two hemispheres having sealing membranes to simplify the filling and sealing process. Slonaker et al teach that it is old and well known in the art to employ a compressed gas paint ball launcher to launch spherical projectiles. Reynolds, Jr. teaches using a flashlight on a launcher to illuminate a target.

44. Commonly assigned application 09/543,289, discussed above, would form the basis for a rejection of the noted claims under 35 U.S.C. 103(a) if the commonly assigned case qualifies as prior art under 35 U.S.C. 102(f) or (g) and the conflicting inventions were not commonly owned at the time the invention in this application was made. In order for the examiner to resolve this

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issue, the assignee is required under 37 CFR 1.78© and 35 U.S.C. 132 to either show that the conflicting inventions were commonly owned at the time the invention in this application was made or to name the prior inventor of the conflicting subject matter. Failure to comply with this requirement will result in a holding of abandonment of the application.

A showing that the inventions were commonly owned at the time the invention in this application was made will preclude a rejection under 35 U.S.C. 103(a) based upon the commonly assigned case as a reference under 35 U.S.C. 102(f) or (g).

45. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Harold J. Tudor, whose telephone number is (703) 306-4172.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Carone, can be reached on (703) 306-4198. The fax phone number for this Group is (703) 305-7687.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-1113.

  
**HAROLD J. TUDOR**  
**PRIMARY EXAMINER**